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No. 88-163

In The
Supreme Court of the United States
October Term, 1988

COMBUSTION ENGINEERING, INC., *et al.*,
Petitioners,

—against—

ARSENIO C. SAPORITO, *et al.*,
Respondents.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the Third Circuit's narrow holding that respondents have standing under Section 510 of ERISA to assert that they would have been eligible for the benefits of an early retirement plan but for petitioners' fraud, coercion, and "trickery" in forcing respondents' retirements in order to prevent them from participating in that plan?

LIST OF PARTIES

The parties are listed in the petition.

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PRELIMINARY STATEMENT

Respondents are thirty-two former employees of Combustion Engineering, Inc. ("C-E") who claim, *inter alia*, that C-E violated Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140[1] by coercing and tricking them into early retirement for the purpose of denying them the benefits of a retirement plan.

The District Court dismissed the complaint on the ground that respondents were not "participants" in the plan from which they were seeking benefits. The Third Circuit reversed, ruling that respondents have standing "because their allegations, if proved, would demonstrate that [respondents] would have been participants in the second plan but for C-E's actions, which effectively tricked them into retirement under the first plan while secretly informing other employees of the second, more lucrative, plan." (App. 6a).[2] The Third Circuit explained that the issue to be addressed was not whether respondents were actual participants in the second plan, but

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1. ERISA, § 510 provides:

> *Interference with Protected Rights*
>
> *It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary* for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan,* this subchapter, or the Welfare and Pension Plans Disclosure Act.

(Emphasis supplied).

2. Citations are to the Appendix of the Petition.

rather whether respondents had standing to raise their allegation that C-E coerced them into retiring, while providing information to some other employees and thus, "in essence, tricked the [respondents] into retiring early. If they had not been tricked, the argument continues, they would have been participants in the VSIP [*i.e.*, the second] plan." (App. 15a). Thus, the Third Circuit concluded:

> By its very nature, a § 510 claim will often involve employees who claim that they did not receive benefits because of the employer's actions, and thus were denied an opportunity to become "participants" in the benefits. *To require that the employees have the status of participant where they allege that the employers' acts effectively deprived them of such status would undercut the provision and cannot have been intended by Congress.*

(App. 15-16a) (emphasis supplied).

As demonstrated herein, the Third Circuit's ruling on the § 510 standing issue is consistent with the language of ERISA and its legislative history, and comports with the intent of Congress. Contrary to the claim by petitioners, this narrow decision in no way expands the definition of "participant" under ERISA, nor does it conflict with any decision of any other circuit. This case simply is not one that addresses the question of "participant" status asserted by petitioners. For these reasons, the petition for a writ of *certiorari* should be denied.

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION DOES NOT EXPAND THE DEFINITION OF PARTICIPANT AND IS CONSISTENT WITH THE INTENT OF CONGRESS

Petitioners have presented an issue that is not involved in the Third Circuit's narrow ruling on respondents' § 510 claim. Petitioners' motive in framing their question presented in terms of "participant status" is transparent—they are seeking to tie this case to *Firestone Rubber & Tire Co. v. Bruch*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, — U.S. —, 108 S.Ct. 1288 (1988), in which this Court will consider the question of which employees or former employees are "participants" under ERISA for purposes of obtaining information about a plan.

Petitioners' attempt to ride the coattails of *Bruch* must fail because that case has nothing to do with ERISA § 510, with the fraudulent deception and trickery of employees in order to deprive them of eligibility for a benefit plan, or with discrimination against them on behalf of other more favored employees. The Third Circuit in this case was addressing such deception, "trickery" and discrimination, and in doing so, noted the special nature of § 510 claims. (App. 15-17a).

Petitioners totally ignore the reasoning of the Third Circuit with respect to the § 510 claim, and instead repeatedly assert that the Third Circuit has expanded the definition of "participant" to an unacceptable breadth. Again, however, the Court of Appeals here did not address

the issue of the definition of participant,[3] but instead ruled that respondents have standing under the non-interference section of ERISA to show that they would have been participants if they had not been "tricked" and "coerced" into retirement by C-E for the sole purpose of preventing respondents from participating in VSIP. Thus, any decision in *Bruch* would make no difference to the outcome of this case.

The decision by the Court of Appeals is consistent with the intent of Congress, the legislative history, and the statutory provisions of ERISA. Under § 510, it is unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or a beneficiary . . . *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .*" 29 U.S.C. § 1140 (emphasis supplied). With respect to this section, Senator Javits, speaking on behalf of the Bill as reported out of the Senate Committee on Labor and Public Welfare, stated:

> Every employee is to have the right, enforceable by the Secretary of Labor, to be free from interference with his pension benefits. *This means that he cannot be discharged, fined, suspended, expelled, or otherwise interfered with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits.*

120 Cong. Rec. 29,935 (1974) (emphasis supplied). With respect to the same section, Senator Hartke stated:

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3. That the Third Circuit was not expanding the definition of participant is clear from its other ruling that respondents lacked standing as participants to assert a claim for breach of fiduciary responsibility. (See App. 11-14a).

> But roughly half of all pension participants are not unionized so they lack protection. *Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting.* . . .
>
> In recognition of that problem, section 610 of S.4 [§ 510] as originally reported—made it illegal to 'discharge, fine, suspend, expel, discipline or discriminate' against plan participants to defeat rights under the act or plan. The language parallels section 8(a)(3) of the National Labor Relations Act and should do the trick- . . . .

119 Cong. Rec. 30,374 (1973).

With respect to the enforcement of ERISA, the legislative history provides:

> *The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.* . . .
>
> • • •
>
> Section 610 [§ 510] makes it unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or a beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant *may become entitled under the plan or the act.* . . ."

H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 4639, 4871.

This history of § 510 makes it unmistakable that an employee who is discharged or, as in this case, tricked

and coerced into retirement and discriminated against in favor of select employees, for the sole purpose of preventing him from attaining retirement benefits, has standing to bring a civil action. This history also makes it plain that a court has the authority to grant the equitable remedy of reinstatement or otherwise to treat employees, like respondents, as having been employed for the entire period until vesting in the plan would have occurred, thereby making them participants in the plan. Here, a court would have the equitable power to deem the respondents participants for purposes of making them whole for the wrong committed by C-E. These are the principles that concerned the Third Circuit, not the definition of participant that petitioners assert.

Finally, petitioners are off the mark in their claim that there is a conflict in the circuits on the issue presented in this case. (*See* Petition, pp. 7-13). In all of the cases cited by petitioners, the courts were addressing ERISA's definition of "participant." In not a single one of those cases was the court faced with allegations by a former employee that s/he was discriminated against and "tricked" into early retirement in order to be deprived of participant status under a plan. Petitioners' attempt to turn the Third Circuit's holding into a sweeping definition of "participant" under ERISA must fail because that ruling does not exist in this case.

———o———

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Dated: New York, New York
September 29, 1988

Respectfully submitted,

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